Supreme Court, U.S.
FILED

97305 MAY 20 1997

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1996

JOSEPH H. DELANEY,

Petitioner

v.

CHRISTINE RODRIGUEZ,

Respondent

On Petition For The Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1) Can a jury which for any reason whatsoever has not seen and deliberated upon 100 % of the evidence duly admitted ever be the rational trier of fact contemplated by Amendments 6 and 14 of the U.S. Constitution and satisfy the test this court announced in Jackson v. Virginia?

2) If a state, by statute and by judicial construction defines and enumerates the elements of offenses it may prosecute, does this create a federally protected constitutional right under Amendment 14 of the U.S. Constitution which the state is obligated to apply equally to all persons so accused?

3) Does a defendant who exercises his right to discovery under state law elect between the right to due process and his right to speedy trial and thereby waive the latter when there is delay occasioned solely by the prosecution's refusal to obey discovery orders and the trial judge's failure to enforce these orders?

4) Does a defendant have a constitutional right, as a part of due process, to adequate police investigation, collection and preservation of evidence, of access to the accusatory process, to an honest prosecutor, and to a trial presided over by an honest judge?

5) When a U.S. District Judge enters an order which recites he grants leave to a party to appeal his judgment pursuant to Fed.R App. Proc. 22(b), but who thereafter issues no formal certificate must the appellate court then hear the appeal upon its merits?

PARTIES TO THE PROCEEDING

The Parties to the proceeding below were Petitioner, Joseph H. Delaney, and Respondent, Christine Rodriguez., Brewster County Adult Probation Officer. The same parties are before this Court.

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(1)

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(2)

This Court should correct the misperception of the court of appeals that different treatment by a state of individuals within the same category or class under identical factual circumstances does not violate the equal protection clause and is not a federal constitutional violation conferring habeas corpus jurisdiction on a federal court.

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(3)

This Court should correct the misperception of the court of appeals that defendants may not simultaneously assert the right to a speedy trial under the 6th Amendment and the right to due process under the 14th Amendment and that the assertion of one constitutes a waiver of the other.

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(4)

This court should settle the question of whether or not deliberate police failure to collect and preserve evidence, active concealment and misuse of evidence before a grand jury and judicial interference with the jury's possession and use of duly admitted evidence violates a defendant's right to due process under the 14th Amendment, and the 6th Amendment right to trial by jury.

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OPINIONS BELOW

The order denying Petitioner's petition for rehearing is reproduced at **App., P. 5**

The opinion of the court of appeals is unpublished but is reproduced in the Appendix to this petition at **App., P. 6**

The order of the district court denying Petitioner's motion for new trial is reproduced at**App., P. 9, 10**

The judgment of the district court denying Petitioner's petition for writ of habeas corpus is reproduced at **App., PP. 11-32**

The opinion of the 8th Texas District Court of Appeals affirming the 83rd District Court of Brewster County, Texas is reproduced at **App., PP. 33-52**

The Judgment of the 83rd District Court of Brewster County, Texas is reproduced at **App., PP. 53-59**

JURISDICTION

The Fifth Circuit issued its order denying Petitioner leave to appeal the district court's judgment on 1/23/97. A timely petition for rehearing was denied on 2/21/97.
This court has jurisdiction Under **28 U. S. C. §1254**.

CONSTITUTIONAL QUESTIONS INVOLVED

Fifth, Sixth, and Fourteenth Amendments

STATUTES INVOLVED

The relevant statutes are reproduced at **App., PP. 72-77**

The relevant federal statutory provision is Public Law 104, amending 28 U.S.C., §2254, and Rule 22(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

This was a habeas corpus application filed in the U.S. District Court for the Western District of Texas, Pecos Division. The district judge adopted the findings and recommendations of the magistrate and entered judgment denying the writ, holding that no federal constitutional violations had occurred. He was thereafter recused, and his successor denied a motion for new trial.

Upon Petitioner's written inquiry as to whether or not this judge would issue the certificate required to appeal, the U.S. District Judge signed an order which was entered after the effective date of this statute in which he said, '*the court shall nevertheless grant Petitioner's request to appeal this cause to the Fifth Circuit Court of Appeals pursuant to Fed. R.App. P. 22(b)*'. Upon his representation Petitioner gave timely notice of appeal, and filed a brief, assuming the judge had kept his word.

He hadn't. He had lied.

The court of appeals, notwithstanding the district judge's order, overruled Petitioner's motion to compel him to issue the certificate, and then held that Petitioner was not entitled to have his appeal heard on the merits because the district judge's failure to do what he promised amounted to a denial.

The court then entered an order dismissing Petitioner's appeal.

STATEMENT OF THE FACTS

This case arises from a state prosecution, No. 2733 in the 83rd District Court of Brewster County, Texas. Brewster County has a centuries old tradition of smuggling and political corruption. It sits astride the country's premier land drug smuggling route. It is awash in drug money.

Its indigenous population is fiercely paranoid toward outsiders, especially politically active ones, so Petitioner was a target from the instant he arrived. The incumbent regime officially declared him a '*Politically dangerous person*'.

This Court is cautioned that there are serious discrepancies between what the record shows and what the courts below recite in their several opinions. The opinion of the 8th District Texas Court Of Appeals, is particularly odoriferous. The details have been set forth in briefs hereto filed by Petitioner in the district court below but which, owing to their size and bulk, could not included in the accompanying appendix.

On the evening of October 31, 1989 Petitioner was assaulted for the 5th time by Malone Hill, a superannuated psychopath, who was angry because Petitioner had filed a lawsuit against him. Hill had a long record of violent behavior. He had attacked many other people. In contrast, Petitioner's record was pristine.

Hill knew Petitioner's schedule for walking his dogs because he had been stalking him. He had attacked Petitioner on the street the day before. **St. Tr. R. Vol. 9, P. 90.** He had once been convicted of assaulting petitioner. **St. Tr. R. Vol. 9, P. 86-87, Vol. 12, P. 49.** When he attacked on October 31, 1989 he was armed with deadly weapons and his declared intention was to commit murder. '*I approached him. I got out of the car. I thought I'd hit him in the jaw with it.*' **St. Tr. R. Vol. 8, P.143.**

Notwithstanding the admissions Hill had made to them the police refused to accept any complaint against him, **St. Tr. R. Vol., 8, P. 6, L.4,** then proceeded to conceal such evidence of his crime as they were not able to destroy outright. Hill became the ruling regime's vehicle of vengeance for Petitioner's political intrusions.

When Petitioner persisted, and made arrangements to go directly to the grand jury, the district attorney interfered to prevent this, **St. Tr. R. Vol. 3, P. 45-48,** and then he himself presented false testimony from one of the policemen in order to procure an indictment of Petitioner. **St. Tr. R. Vol. 8, P. 37-38.**

The prosecution and the judge then collaborated to delay trial for more than 20 months. In this interim two witnesses disappeared and two more, including the only independent occurrence witness, died.

The state's evidence showed that on October 31, 1989 Hill drove his car down a blind alley and across the sidewalk at the precise instant Petitioner and his dogs were crossing the alley in front of him. Hill testified he could have driven away anytime he wished but didn't want to, **St. Tr. R. Vol., 9, P. 69, L. 11-16, Vol.8, P. 143, L. 11,** that instead he stopped, shut off his engine, got out, and armed with a weapon which every state's witness including himself testified was capable of causing serious bodily injury or death he pursued Petitioner down the sidewalk to attack him. **St. Tr. R. Vol. 9, P. 134-139, Vol. 8, P. 59, 114.** He knew from past experience that Petitioner wouldn't fight with him. **St. Tr. R. Vol. 11, P. 88-90, P. 92, P. 99-101, P. 106-108, Vol. 13, P.89-91.**

When Hill attacked he claimed to have a gun. During cross examination he complained that Petitioner was trying to get him to admit that. **St. Tr. R. Vol. 9, P. 73, L. 23, 24.**

Hill either disclaimed personal knowledge of, or denied the existence of each and every fact alleged in the indictment and included in the authorization paragraph of the charge given, so that the state could not and did not prove any of the elements of the alleged offense. **St. Tr. R. Vol. 9, P. 145, Vol. 9, P. 56-57, Vol. 8, P. 148, 149.**

Hill said he had all kinds of trouble with his memory, **St. Tr. R. Vol. 9, P. 19, Vol. 16., P. 64,** and that he did not know what year it was, **St.. Tr. R. Vol., 9, P. 7,** what month it was, **St.. Tr. R. Vol.16, P. 61,** who was president, **St. Tr. R. Vol. P. 62,** or many other things of common public knowledge. Had his effort at murder succeeded he would not have been mentally fit to stand trial. Despite all this Petitioner's objection was overruled. **St. Tr. R. Vol. 8, P. 9.**

Later in the trial, having just given Petitioner leave to publish the duly admitted exhibits to the jury, and before any juror had time to examine any one of these the judge confiscated the whole batch. **St. Tr. R. Vol. 11, P. 74, L. 12-16.**

Two of these exhibits were statements Hill wrote, **St. Tr. R. Exh. Vol., and St's (5) & Def's (9),** that graphically described his efforts to kill Petitioner. Until just a few days before trial the prosecution had not only concealed these, it had denied they even existed.

The judge told the jurors at the time they were sworn they couldn't consider testimony or exhibits which had been ordered stricken, and this was clearly what they thought had happened when he snatched them from their hands. **St. Tr. R. Vol. 6, P. 117-118.**

In the course of prosecution rebuttal at closing argument, while commenting on these same exhibits, the attorney for the state made several direct and impermissible comments on Petitioner's election not to testify. At the same time he injected his own unsworn testimony. For example,

he told the jury he hadn't seen or heard any evidence of a Hill attack the day before, when this incident was described in one of his own exhibits and by Hill's testimony. **St. Tr. R. Vol. 14, P. 34, 35, 36 & 37, L. 4, 5 ,6, & 7.** He complained Hill got on the stand and told them what happened but Petitioner hadn't, and that he couldn't '*cross examine*' another state's exhibit, **St. Tr. R., Exh. Vol., St's (9),** which was Petitioner's motion to dismiss the indictment.

Later, on appeal, contrary to what the record shows, he claimed his comments had been invited and that error was not preserved because the court had not made a vocal ruling on the objection. However, Texas has a statute, **Art. 38.08** of **Vernon's Annotated Texas Code Of Criminal Procedure**, and case authority, *Willis v State*, 785 SW2d 378, Tex. Cr. App., (1989), *Valles v State*, 817 SW2d 138, Tex. App., El Paso, (1991), which except such comments from the contemporaneous objection rule altogether.

Thus, despite Petitioner's diligent efforts, and disregarding an instruction to consider all the evidence, the jury retired to deliberate without the confiscated exhibits, without ever having examined a single one of the exhibits, knowing absolutely nothing of their true contents.

After trial, Petitioner learned of the judge's secret ex-parte relationship with the defendant in a civil case he had just heard and had under advisement while the criminal trial was in progress. **St. Tr. R. Vol. 16, P. 91, Vol. 18, P. 30-42.**

Petitioner was plaintiff in that suit. The district attorney who had initiated this prosecution had a direct and substantial financial interest in its outcome.

During the time Petitioner's appeal was in preparation this same district attorney became first a judge, then chief judge of the 8th Texas District Court of Appeals. Although he theoretically recused himself from participating

in the decision he left his tracks in the opinion by reference to matters dehors the record that only he would have known.

Because of this conflict the trial judge was recused from participation in subsequent post-trial proceedings and reprimanded by the Judicial Conduct Commission, but this could not be accomplished until after he had denied Petitioner's motion for new trial.

SUMMARY OF ARGUMENT

A rational trier of fact as contemplated by **Jackson v Virginia**, is one that determines, by examining and weighing 100% of the duly admitted evidence, whether it has or has not a reasonable doubt that all of the elements of an offense defined by state law have been proven. A jury that, for any reason, does not do that is not a rational trier of fact and as a matter of law any verdict it reaches is based on insufficient evidence. The constitutional right to due process of law is a absolutely unwaivable right whose absence renders judicial actions totally void.

Without constitutionally sufficient reason a state cannot deny a party the benefit of state legislation and judicial precedent requiring proof beyond a reasonable doubt of all facts pleaded and charged, which is afforded all other persons similarly situated, and such denial deprives that party of both due process of law and equal protection under the law.

Construction of a state statute, arbitrarily, irrationally, and discriminatorily, so as to obligate a selected person to insure the safety of an assailant attempting to murder him, contrary to settled state law, violates both the due process clause and the equal protection clause of Amendment XIV.

A federal court may not find procedural default based on a state's allegations that contemporaneous objection was not made to prosecution comments violating the 5th Amendment right not to testify when by the settled law of the state involved no objection is necessary to preserve error in this circumstance. Nor may a federal court defer to a finding of invited argument made by a state court when the same is demonstrably contrary to the evidence in the record.

Once evidence is duly admitted and placed in the custody of the jury any interference by the trial judge which prevents the jury from examining it usurps its province and abridges the accused's Sixth Amendment right to trial by an impartial jury .

Inadequate Police investigation, failure to procure, protect and preserve vital evidence, prosecution concealment of evidence from both the defense and the grand jury, and obtaining indictment by using false evidence renders the entire process of accusation and trial fundamentally unfair.

An accused cannot be required to elect between constitutional rights but may exercise any or all of them simultaneously, each to its full extent. A finding by a state trial judge that none of the delay of trial was caused by the accused is a fact finding to which the federal court must defer. Death or dissappearance of witnesses, particularly a disinterested occurrance witness, is ipso facto prejudicial to the defense.

REASONS FOR GRANTING THE WRIT

1) This Court should correct the misperception of the court of appeals that Jackson v Virginia is no longer the law of the land and should reaffirm that due process of law means proof beyond a reasonable doubt of every fact required by the law of the prosecuting jurisdiction.

In ruling that it found no federal constitutional violations in this case the court below placed itself in direct conflict with *Jackson v Virginia*, 443 U.S.307, (1979), and its antecedents, *Davis v. U.S.*160 U.S. 469, (1895), and *In Re Winship*.

These cases demand proof beyond a reasonable doubt of every fact necessary under the law of the charging state.

It is axiomatic that jurors who have to guess about what the duly admitted evidence is because they've never seen it have no rational basis for ruling out reasonable doubt. The trial by jury contemplated by the **6th Amendment of the U.S. Constitution** must be a meaningful deliberation upon all the lawfully admitted evidence.

The jurors could gain no insight into guilt or innocence from this ambiguous stack of papers sitting on a desk beyond their reach. Such insight arises only from thorough examination, which didn't even come close to happening.

The exhibits were anything but inconsequential, they were the heart and soul of the defense, exculpatory of guilt, damning to the prosecution.

Included among them were two statements written by the complaining witness, offense reports relating to his prior conviction for assaulting Petitioner, court records relating to his assaults on other people, correspondence relating to Petitioner's lawsuit then pending against him, documents originating with a police officer who had testified he had omitted everything exculpatory from them and then used them before the grand jury, other accounts of details of prosecution misbehavior, and all the photographs of the scene.

The very fact that all of these exhibits had been duly admitted, mostly without objection, forecloses all question

of their relevance and materiality To satisfy Jackson and perfect these two most basic rights, trial by jury and due process of law, the jury was constitutionally obligated to deliberate upon the weight of these exhibits. They didn't do that.

The trial judge could have remedied this by granting the defense motion for a new trial. It was against his personal interest to do that. He knew this was wrong and that he was culpable. Undoubtedly, this is why he remarked on the record, during sentencing, that the case should never have been prosecuted. **St. Tr. R. Vol. 16, P. 84.** There are numerous other peculiarities associated with the judgment he entered in this case, all of which were raised in the petition for habeas corpus and addressed by the district court. This judgment does not satisfy the requirements of Texas law. It is void on it's face.

This court said, in numerous cases, i.e., *Brady v. Maryland* 373 U.S.83, (1963) and *Giles v. Maryland*,386 U.S. 66,(1967), that police or prosecution concealment of such vital evidence as these confiscated exhibits represented violates the due process clause of the **14th Amendment of the U.S. Constitution**. The rules they establish should be expanded to deal with judicial interference which amounts to the same thing and works the same injustice.

What made this immeasurably worse in the case sub judice was that everybody, including the judge, whose primary obligation it was to insure that the trials he held were fair, joined in this pernicious activity.

How is judicial misconduct different or less contemptible than police or prosecutorial subversion? Why should it matter why a trier of fact has failed in its mission to satisfy the due process requirement? How could laying blame either excuse its absence or make that absence any worse?

The judgment of the district court, and the order denying the motion for new trial and the orders entered by the 5th circuit Court of Appeals all say there that were no federal constitutional violations in this case, but the one thing that not one of them deny is that the jury never saw a major part of the lawful, duly admitted evidence. No one -- absolutely no one controverts this fact.

Due process cannot be measured in degrees. It is either present or not present. Due process exists only as an entirety. Like pregnancy or death, it is all or nothing.

Despite the simplicity of this concept it was beyond the grasp of the court below.

Petitioner concedes this incident to be unique in American Jurisprudence, Although it is common practice in other totalitarian countries, never before during forty years in this profession has Petitioner seen or heard of any judge anywhere in this country doing what this judge did. Neither has any precedent been found.

The *Jackson* test, as it is, cannot handle this situation. To fit its facts the standard of review must be changed FROM: 'whether any rational trier of fact could have found guilt from the evidence of record', TO: 'whether any rational trier of fact could have found guilt from the evidence of record *which it has actually seen and considered.*' That is a monumental difference.

Due process means trial on the evidence, not on the jury's guess about what the evidence is.

2) This Court should correct the misperception of the court of appeals that different treatment by a state of individuals within the same category or class under identical factual circumstances does not violate the equal protection clause and is not a federal constitutional

violation conferring habeas corpus jurisdiction on a federal court.

Jackson v Virginia, Supra, says, Footnote 16]:

> 'The respondents have suggested that this constitutional standard will invite intrusions upon the power of the States to define criminal offenses. Quite to the contrary, the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law'.

The magistrate, whose findings the district judge adopted, cites *Brown v. Collins*, 937 F2d 175, CA5, Tex., (1991), as the source for determining what the substantive elements of offenses are in Texas.

The trouble with *Brown* is that *Brown* says certain of the substantive elements established by the Texas legislature and appellate courts represent '*a nuance not of constitutional caliber*'.

Brown is thus in direct head-to-head conflict with this Court's holdings in *Mullaney v Wilbur*, 421 U.S.684, (1975), which binds federal courts to state court construction of their own law, and *Dunn v. U.S.*, 442 U.S. 100, (1979), which prescribes that defendants must be tried on the specific charges under which they stand accused.

Dunn makes it pretty clear that when a state court says something is an element, or part of an element there must be no further argument.

The 8th District Texas Court of Appeals, deciding a case brought under the identical statute involved in the case sub judice, held, *Collins v State,* 890 SW2d 893 at 898, Tex.

App., El Paso, P. 893, (1994); *'Under* ***Texas Law*** the ***elements*** *of a criminal offense* *are: (1), the forbidden conduct, (2) the required culpability, (3), any required result, and (4), the negation of any exception to the offense'.* (Emphasis added)

Coincidentally, this is the former District Attorney who engineered this prosecution of Petitioner, speaking Ex Cathedra as chief justice, quoting Vernon's Annotated Texas Penal Code, Sec. 1.07 (22) verbatim.

The Texas Court of Criminal Appeals ruled, in *Ortega v State*, 668 SW2d 701, Tex. Cr. App, (1983) and *Arceneaux v. State*, 803 SW2d 267, Tex. Cr. App., (1990), that, once an instruction, correct in terms of the insufficiency rationale in *Jackson v Virginia* is incorporated into a charge in such a manner as to require the jury to find that fact beyond a reasonable doubt before it can render a verdict of guilt the state must object to the instruction, requesting a modification of the one submitted, or prove that substantive fact, otherwise the evidence is insufficient as a matter of law to support the only verdict of guilty which was authorized.

The district judge, Opinion, P. 8-9, claims there are allegations in the indictment and charge that are not in fact there, and he totally ignores the testimony of the state's medical witness that the supposed events recited on P. 5 & 6 of the opinion could not have happened without leaving conspicuous signs which he would have found and didn't find. **St. Tr. R., Vol. 10, P. 5-10, P. 18-20.**

This testimony is incredible as a matter of law. Such things simply do not occur in nature, any more than that the two dogs, whose presence Hill initially acknowledges but otherwise doesn't mention, would have quietly stood by and watched. Logic suggests that if he sustained an injury at all it would have been a dog bite. The adverse inferences to be

drawn from what Hill didn't say are far more reliable than his testimony.

Ever since the Texas law was clarified by the doctrine expounded in the *Ortega v State*, Supra, it has been consistently and uniformly followed and applied without deviation in every case arising on like circumstance -- except in the case sub judice. More than a hundred subsequent decisions of the Texas Appellate Courts have since reaffirmed it is the substantive law of this state.

In the case sub judice both the indictment and authorization paragraph required proof of a particular, specifically identified fact beyond a reasonable doubt, forbidding conviction and mandating acquittal if this wasn't proven beyond a reasonable doubt. The state neither objected nor introduced even a shred of proof. To a man, every prosecution witness denied all knowledge of this alleged fact.

The state did no better on the rest of the elements. Its case didn't just flunk *Jackson v. Virginia*, Supra, it flunked *Thompson v. Louisville*, 362 U.S. 199, (1960) as well.

The prosecutor's troubles with the first element, the forbidden conduct, began when he asked Hill about this alleged fact, which was the very foundation of the state's case, and Hill answered, '*I guess, I don't know*'. **St. Tr. R. Vol. 8, P. 145.** After Hill, the other prosecution witnesses who followed did the same. **St. Tr. R. Vol. 8, P. 105.**

The second element, specific intent to cause injury, the offense being result oriented, is not supplied by proof of mere presence or even engaging in conduct that might cause injury. Texas law does not require victims to insure the safety of people who hunt them down and try to kill them, *Alvarado v. State*,704 SW2d 36, Tex. Cr. App, (1986), *Haggins v. State*, 785 SW2d 827,

Tex. Cr. App., (1990). Such people, if so disposed, can easily avoid the risk of injury simply by keeping their hands off other people's bodies.

The third element, any required result, could not be established and was not established by Hill's testimony that although he had a cut on his butt he did not know how, where or when he got it. **St. Tr. R. Vol. 9, P. 56-57.** Nothing except conjecture connects this cut either to Petitioner or to the occurrence. **St. Tr. R. Vol. 8, P. 148-149.**

Moreover, Hill testified he fled the scene when his assassination attempt went sour, and that he only returned much later, after the police arrived. **St. Tr. R. Vol. 8, P. 148.** The record is silent as to his activities during this absence.

The fourth element, the negation of any exception, falls flat because the prosecutor declared in the presence of the jury, '*We're not claiming Mr. Hill was defending himself, O.K.?*', **ST. TR. R. Vol. 8, P. 101, L. 19**, and followed his admission up with Hill's admission that he was attempting to commit cold-blooded murder.

Hill's testimony was that although he faced no force whatsoever, or any threat of force, and could have driven away anytime he wanted, he didn't want to, **St. Tr. R. Vol. 9, P. 67-B to P.73**; that he left his car, and being then armed with a deadly weapon, he pursued Petitioner, who was at that time in flight, down the sidewalk in order to attack him. **St. Tr. R. Exh. Vol., S's (5) & Def's (9).** The exhibits, many of them state's exhibits, both corroborated this damning testimony and furnished further details.

Having itself raised self defense as an exception, the state was then obligated to negate it as part of its burden of proving Petitioner guilty beyond a reasonable doubt. It

didn't negate this exception. It proved the exception's existence instead, so the presumption of innocence prevails.

As to Petitioner, the state failed to prove even a corpus delicti, though it proved an airtight case of attempted murder against Hill.

Under well settled Texas law Hill's behavior was both aggravated assault and attempted murder and by both statute and viable precedent this entitled Petitioner to respond with deadly force if a reasonable man in these circumstances would have done so. *Rhoden v Booth*, 344 SW2d 481, Tex. App., (1961), P. 485, *Perez v State*, 290 SW2D, 514, 516, Tex. Cr. App., and *Holmes v. Holmes*, 588 SW2d 674, Tex. App. Beaumont, (1979), **Vernon's Annotated Texas Penal Code, § 9.31, 9.32**.

If the state had proven Petitioner used any lesser force, and it didn't, and had proven that Hill got his butt cut at this time, and it didn't, and that Petitioner inflicted the cut, and it didn't, so what? What is this, balanced against somebody's life?

The bedrock of due process as the 14th Amendment knows the concept under *Jackson v. Virginia, Supra,* is that every party accused is entitled, not only to be judged under the law of the state which charges him, but to receive the same treatment that state gives everybody else under identical circumstances.

Again, that didn't happen. State law, promulgated for the specific purpose of insuring that all state trials would pass the *Jackson* test, was ignored in this case and in this one case only.

From the dawn of the day of its creation this Court has acknowledged that in the very process of enacting penal statutes states also simultaneous generate liberty interests that federal courts are constitutionally obligated to protect and enforce.

The right to equal protection is one of these, and because it was abridged Petitioner has come to this Court.

3) This Court should correct the misperception of the court of appeals that defendants may not simultaneously assert the right to a speedy trial under the 6th Amendment and the right to due process under the 14th Amendment and that the assertion of one constitutes a waiver of the other.

Texas law provides a very narrow right to depose witnesses in criminal cases. Upon Petitioner's demonstrated need he was given leave to depose the witnesses on the state's list who had not voluntarily submitted to interview.

The state defied this order, as well as the order to furnish criminal histories and other *Brady* Material.

Had the state complied with discovery orders on schedule, with or without enforcement action by the judge, there would have been no delay of trial, and trial would have been completed while the witnesses who later disappeared or died were still available to testify.

Petitioner tried to expedite discovery with motions to sanction the state. **St. R. Trial Transcript**. Two timely speedy trial demands were filed, the first immediately after the prosecutor refused to produce the witnesses on the date he had chosen. It was combined with a motion to dismiss the indictment because of prosecution misconduct. No witness had yet died or disappeared.

The judge totally ignored this case.

A whole year elapsed between the hearing on Petitioner's motion to depose witnesses on August 13, 1990 and the next docket call on August 12, 1991. Even that one would never have occurred had not Petitioner filed

application for a writ of mandamus in the Court of Criminal Appeals to compel the judge to move.

The mandamus infuriated the judge, who then summarily denied all pending defense motions, set trial for the following week and ordered depositions instanter.

By then 20 months had passed. Two witnesses had vanished, two had died, and one of the latter was the crucial occurrence witness the prosecutor knew was hostile to the state and supportive of Petitioner.

The trial record shows no explanation or excuse by the prosecutor or judge. It does show that the trial judge found as a fact none of the delay was Petitioner's fault. **St. Tr. R. Vol.4, P. 47, L. 15-19.** Contrary to the claim of the court below this declaration could not have been more plainly in context than it was.

Only the prosecutor and his supporters benefited from the delay. The prosecutor had at last acquired a measure of control over his mortal enemy, a person allied with the political opposition which eventually drove him from office, and whom he had officially declared to be a '*Politically dangerous person*'. He clung to this by delaying trial. Against an unfavorable eyeball witness, he knew he had another sure loser. Petitioner had beaten him in every case they had ever tried together.

Delay hardly benefited Petitioner, who wanted to get on with trial, end this onerous restraint and finish off the corrupt regime.

The loss of the witnesses changed everything. Now, as the prosecutor told the jury, his case had become, '*A swearing match*', **St.Tr. R., Vol. 6, P. 64, L. 21,** between Hill, the insider who was above the law, and petitioner, who had been effectively outlawed. The need to determine what the state's witnesses would say was correspondingly magnified.

The state had filed a long list of people it claimed it would call. All but one of them either failed to respond to certified mail requests to submit to interview or refused delivery of the letters. They could be deposed.

By contrast, under Texas law, a cooperative witness cannot be deposed unless there has also been a present showing he will be unavailable to testify at trial. (In the judgment he entered, P. 17, the U.S. District Judge suggested Petitioner should have perjured himself so he could depose the dead eye-witness. The magistrate, ignorant of the rule against it, advocated the use of hearsay evidence). **Vernon's Annotated Texas Rules Of Criminal Evidence, Rule 801 (d).**

Out of more than a dozen on the list, and of those ultimately deposed, the state called only one witness, an Alpine policeman, and it was at his deposition, bare days before trial was set, that he unintentionally revealed the state had two written statements from Hill which it had concealed for almost two years, contrary to the order to disclose *Brady* materiel. This is the only reason the prosecutor finally coughed them up.

That revelation alone shoots the argument for waiver full of holes and vindicates Petitioner for insisting on having discovery, even though because the statements were among the confiscated exhibits he lost their benefit anyway. The prosecution's total control of all the witnesses and of official records enabled it to get away with many other *Brady* violations.

This harebrained waiver theory originated with the 8th District Texas Court of Appeals, over which the D.A. who actually was responsible for the delay then presided.

The U.S. District judge adopted the idea, claiming it was a factual finding by the state appellate court to which he had to defer. That isn't true, of course. That conclusion

wasn't supported by the record, it was repugnant to the record.

To characterize this behavior, per **Supreme Court Rule 10 (a),** as a departure from the accepted and usual course of judicial proceedings would be a gross understatement. None of the cases above-cited suggest election is required, or that constitutional rights cannot be simultaneously exercised.

Requiring election has the effect of overruling *Giles v Maryland, Brady v Maryland,* both Supra, *U.S. v Agurs*, 427 U.S. 97, (1976), and all their derivatives, and gives any prosecutor the power to disarm any defendant simply by refusing to comply with the mandates of these authorities.

What is certain is that when this Court decided *Barker v Wingo*, 407 U.S. 514, (1972), in which it expounded at some length on the subject of waiver, citing such prior and pertinent decisions as *Johnson v Zerbst*, 304 U.S. 458, (1938) and *Carnley v Cochran*, 369 U.S.506, (1962), it never contemplated that circumstances such as these would satisfy the tests those cases established.

In the case sub judice there clearly occurred a radical departure from the accepted and usual course of judicial proceedings. The 5th Circuit Court of Appeals just as clearly sanctioned this, and the exercise of this Court's supervisory power appears to be appropriate.

Moreover, the question of whether simultaneous exercise of all available constitutional rights can be curtailed is undeniably federal, undeniably important and as yet neither addressed nor settled by this court.

4) This court should settle the question of whether or not deliberate police failure to collect and preserve evidence, active concealment and misuse of evidence before a grand jury and judicial interference with the jury's possession

and use of duly admitted evidence violates a defendant's right to due process under the 14th Amendment, and the 6th Amendment right to trial by jury.

The testimony of Bryan Ward of the Alpine Police Department was strange indeed. He testified he and a partner responded to a complaint that murder had been attempted. He did not recover Hill's weapon, **St. Tr. R. Vol.8, P. 29,** which the dead witness showed him was lying on the sidewalk, he did not arrest Hill though asked to do so upon Hill's confession, he took no witness statements, he didn't look for the gun Hill claimed to have had, he didn't look for witnesses but merely stood under the streetlight to see if any volunteered, he thought collecting and preserving evidence was the victim's job, **St. Tr. R. Vol. 8, 110,** and left it all uncollected at the unsupervised scene while he carted Hill off to seclusion.

Although acknowledging both from the stand and in his report that Petitioner claimed Hill tried to run over the dogs and he, and though the dead witness showed him Hill's skidmarks, **St. Tr. R. Vol. 8, P. 29,** he did not photograph these as he did the window Hill had broken.

He testified he had selectively omitted from his report all reference to Hill's written and oral admissions of being armed and of pursuing Petitioner down the sidewalk in order to attack him. He testified he used this report before the grand jury but did not tell them about all the things he had omitted. **St. Tr. R. Vol. 8, P. 36, 37, 52, 53.**

This is what the 8th District Texas Court of Appeals called an '*adequate police investigation*'?

The record shows a entirely different picture, a mission with three objectives: rescue Hill before he shoots his mouth off in public any more than he has already, destroy

all evidence of Hill's crime and block Petitioner from filing a complaint against Hill.

It worked, to a point, although he left many loose ends the D.A. and the trial judge eventually had to tie up. His misbehavior has to be considered in the light of theirs.

In *Brady v. Maryland*, Supra, this Court settled the question of whether due process is violated when prosecutors fail or refuse to disclose favorable evidence material to guilt or innocence.

Petitioner has, herein and above, asked the Court to settle whether confiscation of evidence by the judge also violates due process.

This court has yet to say with specificity whether a Brady-style violation occurs if police make only a sham investigation, or if they lose, destroy or secret evidence potentially favorable to the accused. So far, it has merely danced around the point a little. *Foster v. California*, 394 U.S. 440, (1969) and *Mooney v Holohan*, 294 U.S. 103,(1935).

But the Texas Court of Criminal Appeals, acknowledging this was an important question of federal law, confronted it headlong in *Ex Parte Brandley*,781 SW2d 886, Tex., Cr. App (1990), and held this does in fact deny due process.

In *Brandley*, the police knew of other suspects on scene, knew blood inconsistent with Brandley's type had been found on the deceased's body, yet failed to collect blood and semen samples from their other suspects or share these findings with the defense.

Because the police normally have total and exclusive control of the scene and a monopoly on collecting and preserving evidence, because persons accused are so vulnerable to harm occasioned by sloppy and inadequate

investigations, and because every defendant is potentially a victim, this question is a very important one.

This court should seize this opportunity to settle it.

5) This Court should clarify the obligations of district judges and appellate judges with respect to the granting or denial of certificates of appealability in 28 U.S.C. §2254 cases.

The general consensus among the several U.S. Courts of appeal seems to be that as to this category of **§2254** cases only the name of the required certificate has been changed. Since the effective date of amendment the court below has continued to recognize the power of district judges to issue these certificates and concedes that when this occurs the appeal must be addressed on its merits.

What is now in contention is the appellate court's obligation where a district judge says he is issuing a certificate but never does it.

The district judge's order of May 2,1996 was not a denial of the certificate. It acknowledged he had been solicited to issue the certificate required by **Fed. R. App. Pro. 22(b)** to appeal the judgment he had entered and that is what he said he was doing.

The language of **22(b)** is just as clear. The appellate judges' power to issue a certificate is conditioned upon denial below, otherwise that court's only choice is to hear the appeal on its merits.

Upon learning that the district judge had neglected to issue the actual, physical certificate Petitioner moved the appellate court to order him to do so or in the alternative to treat the order he signed and entered as the certificate's equivalent so the case might be set for submission. In a

nutshell, the court of appeals was asked to compel him to make good on the contemptible lie he told.

This was not only within this courts power but consistent with traditional equitable principles. Instead, the court denied the motion in order to act contrary to **Rule 22(b).**

Customarily, parties, witnesses or attorneys who behave as this district judge did are sanctioned, and not infrequently prosecuted for obstructing justice. But judges seem to be a privileged aristocracy, above the law even when they lie, as this one did, even when they have forbidden, ex-parte dealings with witnesses, as this judge's predecessor did, and even when they interfere with the function of juries, as the state trial judge did.

Sooner or later every victim of such injustice, however patient he is, reaches the point where he will take no more of it. This country would not exist were this not so. I will take no more of it.

This situation clearly mandates the exercise of this Court's supervisory power. There is yet no guiding authority on this particular point, and won't be, until this court makes some.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: _____ , 1997, Alpine, Texas

Respectfully submitted,

_____

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